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IN THE

Supreme Court of The United States

No.

DURELL PRODUCTS, INC.,

Petitioner,

v.

AJAX REALTY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on December 12, 1972.

OPINIONS BELOW

The Memorandum Opinion of the District Court for the Eastern District of Virginia granting petitioner's motion to dismiss and to quash service of process is printed in Appendix A hereto and is unreported. The opinion of the Court of Appeals, which reversed the judgment of the District Court for the Eastern District of Virginia, is printed in Appendix B and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix B hereto, was entered on December 12, 1972. A rehearing was not requested.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Virginia Long Arm Statute, § 8-81.2 of the Code of Virginia, 1950, as amended, violates the due process clause of the Fourteenth Amendment to the United States Constitution when applied to confer jurisdiction of a U.S. District Court in Virginia over a State of Washington corporation which manufactured window frames for a Colorado buyer, who after manufacture, directed the windows to be shipped to its customer in Virginia, this being the single, isolated, contact with Virginia.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the due process of law clause of the Fourteenth Amendment, United States Constitution.

The statute involved is § 8-81.2 of Title 8, Chapter 4.1, of the Code of Virginia of 1950, as amended in 1964, and is officially reported in Volume 2, Code of Virginia, 1950, 1957 Replacement Volume, 1972 Commulative Supplement, page 33. The pertinent parts of the Section are:

> § 8-81.2 When personal jurisdiction over person may be exercised.
>
> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's
>
> (1) Transacting any business in this State;

(2) Contracting to supply services or things in this State;

(3) Causing tortious injury by an act or omission in this State;

(4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;

(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; . . .

STATEMENT OF THE CASE

Petitioner, a corporation located in the State of Washington, and herein referred to as Durell, manufactured unglazed window frames which C&S Sales Company, a Colorado corporation, purchased and sold to Ajax Realty Corporation, hereinafter referred to as Ajax, a Virginia corporation. The window frames were ultimately incorporated in an apartment building in Norfolk, Virginia. Because the windows allegedly leaked, Ajax instituted this action against Durell and others alleging both breach of warranty and negligence. Jurisdiction of this action was based upon diversity of citizenship. 28 U.S.C.A. § 13.32.

The facts which were not disputed in the District Court are as follows: The window frames in question were manufactured by Durell at Seattle, Washington; it is a Washington corporation; and it does "almost all of its business in five western states." It

has never been domesticated in Virginia and has never had or maintained any manufacturing, sales office, storage or other business facility in Virginia. None of its officers, directors or employees have ever been in Virginia on any company business, except to investigate the damage claim asserted in this suit. It has never advertised, solicited, or contracted any sales in Virginia, and its products were not distributed in Virginia. It has never had a distributor, jobber, broker, agent or manufacturer's representative in Virginia.

Durell sold the windows in question to C&S Sales of Denver, Colorado. The transaction was handled entirely outside of Virginia, and Durell was not in any way involved in the transaction which resulted in the sale and use of the frames in Virginia. Neither C&S Sales nor any of its personnel is an agent, representative, jobber, broker or distributor for Durell.

The sale by Durell to C&S Sales was for unglazed frames and without window glass. While the frames were being manufactured, C&S Sales requested Durell to forward a sample frame to a Mr. Diamond in Chicago so that Diamond could make preparations to install glass in the frames. Thereafter, Durell was directed to ship the frames to Norfolk, Virginia. The freight was prepaid and billed to C&S Sales. Later some additional frames were shipped to replace frames damaged in transit. The frames were glazed and installed by others. Durell had no further contact with the frames until advised of the alleged defects, at which time it offered its assistance in attempting to alleviate the problem.

Durell's price to C&S Sales Corporation was approximately $37,000.00. Durell was a non-resident of Virginia. Process for it was served on the Secretary of the Commonwealth of Virginia, pursuant to the provisions of the Long Arm Statute. Durell moved to dismiss the action or quash the return of service of summons. The District Court found that no part of the Long Arm Statute was applicable to Durell and, therefore, the motion to dismiss was granted, service of process on Durell was quashed

and it was dismissed as a party defendant. In his Memorandum Order, the District Judge found as follows:

> "Durell does not *regularly* do or solicit business in Virginia, or engage in other *persistent* course of conduct, or derive substantial revenues from goods used or consumed or services rendered *in this State*." (Appendix (A, p. 7).

The Fourth Circuit Court of Appeals reversed the District Court, finding that the $37,000.00 which Durell derived from Ajax's use of the frames in Virginia constituted "substantial revenue," under § 8-81.2 (a)(5) and further that the application of § (a)(5) to Durell does not violate the due process clause of the Fourteenth Amendment. The Order of the District Court dismissing Durell and services of process was reversed, and the cause remanded to the District Court for further proceedings not inconsistent with the Opinion.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court. Further, this Court should grant *certiorari* to settle the question of to what extent should the trend toward removing all restrictions on the personal jurisdiction of state courts over foreign corporations be permitted to continue.

Now accepted universally as a fundamental premise, the doctrine that due process requires only that a foreign corporation have "certain minimum contacts" within the territory of the forum, so that the maintenance of the action does not offend traditional notions of fair play and substantial justice, was set forth by this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). It was subsequently applied in the case of *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), and the last major application was made in the case

of *Hanson* v. *Denckla*, 357 U.S. 235, 251, 78 S. Ct. 1228, 1238, 2 L. Ed. 2d 1283, 1296 (1958).

In *Hanson, supra*, this Court noted that the requirements for personal jurisdiction over nonresidents had changed considerably since "the rigid rule of *Pennoyer* v. *Neff*" because of "progress in communications and transportation," but qualified this by stating:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdictions of the state courts. Those restrictions are more than a guarantee of immunity from inconvenience or distant litigation. They are a consequence of territorial limitations on the power of the respective states." 357 U.S. at 251, 78 S. Ct. at 1238, 2 L. Ed. 2d at 1296.

The Court was careful to insist "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253, 78 S. Ct. at 1240, 2 L. Ed. 2d at 1298.

Since *Hanson, supra*, there has been much divergence of judicial opinions in the application of the "minimum contacts" doctrine and where the line of limitation falls continues to be a subject of prolific controversy. The majority of cases still hold that jurisdiction cannot be constitutionally based upon an out-of-state contract when the defendant has performed no acts whatsoever within the state. However, there is a discernible trend which is broadening the doctrine further than was intended by either *McGee, supra*, or *Hanson, supra*, and perhaps it is best exemplified by the case of *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961). In *Gray*, an Illinois plaintiff sued an Ohio manufacturer of a safety valve which had been sold to a Pennsylvania corporation for installation in a hot water heater, which was then sold to a consumer in Illinois. The hot water heater in question had exploded in Illinois injuring the plaintiff, allegedly

as a result of a defect in the safety valve, and jurisdiction was sought over the valve manufacturer in spite of the fact that its only contact with Illinois was the sale of the single valve to the Pennsylvania hot water heater manufacturer. The Court found that the "minimum contacts" requirement had been satisfied because "at the present time, it is sufficient if the act or transaction itself has a substantial connection with the State of the forum." 22 Ill. at 438, 176 N.E. 2d at 764.

Perhaps one of the best known cases applying and interpreting the doctrine in *International Shoe*, *supra*, was decided by the Fourth Circuit in 1956. In *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F. 2d 502 (4th Cir. 1956), the plaintiff attempted to obtain jurisdiction in North Carolina over a New York manufacturer who had shipped synthetic fibre F.O.B. to the plaintiff's factory in North Carolina. Plaintiff had placed the order following a visit by its representative to the defendant's plant in New York, and the defendant's only in-state activity was a trip by its general manager to North Carolina to discuss Erlanger's complaint that the yarn was defective. The Court found that there were insufficient "minimum contacts" to sustain jurisdiction under the North Carolina "long arm" statute and in responding to plaintiff's claim that the size of the monetary interest involved ($17,000.00) supplied the minimum contact required, the Court said at p. 507:

> "The Supreme Court has said that the quality and nature of the activity must be considered and it may be conceded that in some circumstances the sum involved may also be pertinent; yet the bounds of due process cannot be staked out in financial niceties in order to sanction jurisdiction not otherwise justifiable."

The case of *Beaty* v. *M.S. Steel Co.*, 276 F. Supp. 259, also rejects the decision laid down in *Gray*, *supra*. In Beaty, bar joists were manufactured in Alabama, pursuant to a contract entered into in Massachusetts, and shipped into Maryland where one collapsed while being installed at the job site in Maryland.

The Court at p. 263 stated the following:

> "Furthermore, although the precise question has not as yet been presented to the state or Federal courts in Maryland, this Court concludes that the *Gray* case would not be followed by the Maryland Court of Appeals. It would offend traditional notions of fair play and substantial justice to hold that a nonresident corporation could be sued in Maryland merely because on one occasion its product manufactured in another state was shipped into and used within this state. As the Supreme Court said in Hanson v. Denckla, 357 U.S. 235 (1958) at page 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283:
>
> > 'The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'."

Opinions in the following cases not only indicate that there is conflict among the Circuits and States but also indicate that a slight majority of courts have held the line in accordance with the limitation enunciated in *Hanson, supra*:

Lone Star Motor Import, Inc. v. *Citroen Cars Corp.*, 185 F. Supp. 488 (S.D. Texas 1960), rev'd. on other grounds, 288 F. 2d 69 (5th Cir. 1961).

Allied Fin. Co. v. *Prosser*, 103 Ga. App. 538, 119 S.E. 2d 813 (1961).

Tyee Constr. Co. v. *Dulien Steel Products, Inc.*, 62 Wash. 2d 106, 381 P. 2d 245 (1963).

Perlmutter v. *Standard Roofing & Tinsmith Supply Co.*, 43 Mics. 2d 885, 252 N.Y. S 2d 583 (S. Ct. 1964).

Byham v. *National Cibo House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965).

Kourkene v. *American BBR, Inc.*, 313 F. 2d 769 (9th Cir. 1963).

In the present case, it is acknowledged that the only contact that the petitioner had with Virginia was a "solitary and fleeting contact," viz., its shipment to Virginia of window frames sold to a Colorado firm. (App. B, p. 7b). The Court of Appeals also acknowledged that "It is problematical whether Durell realistically is in a position to invoke the benefit of the laws of Virginia." (App. B, p. 7b). But, notwithstanding, the Court follows by stating, "But the day is long past when the 'minimal contact' necessary to satisfy due process is to be equated with the traditional concept of doing business." (App. B, p. 8b).

The requirement that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, is not tantamount to the traditional concept of doing business. The "doing business" concept most certainly would require more, but the doctrine as developed in the triology of *International Shoe*, *supra*, *McGee*, *supra*, and *Hanson*, *supra*, makes it essential that in each case there must be at the very least some type of act such as heretofore described.

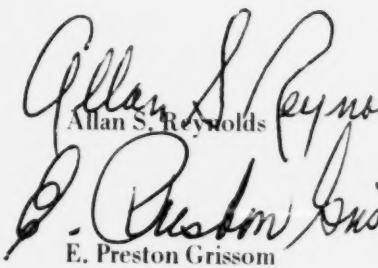
The amount involved standing alone, therefore should not constitute sufficient criteria for determining "minimum contacts." It is conceivable that the amount might be pertinent in a case involving a contact or activity other than an isolated shipment. For example, if a defendant shipped items having a value of $10.00 each into a state over a period of time, then the aggregate worth of the items shipped would be indicative of a significant number of contacts. Or, if a defendant shipped one

item of substantial value into a state pursuant to a contract entered into with a resident of that state, then the value may be pertinent. There is no such other act, contact or activity in the case at bar.

The petitioner recognizes that what amounts to due process regarding the application of "long arm" statutes is certainly not static, and our advancing methods of transportation and communication should be considered in reaching the proper level of restraint. However, to subject a defendant to a suit in a state where it has never solicited, advertised, or transacted business and where its only contact is shipping goods following completion of its obligations under a contract entered into and totally performed in another state on behalf of its customer who is not a consumer in that state, offends due process. It places a hardship on every manufacturer of goods regardless of its relationship with the state in which such goods may finally come to rest.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.



Allan S. Reynolds

E. Preston Grissom

Counsel for Petitioner

AFFIDAVIT OF SERVICE

STATE OF VIRGINIA,

CITY OF NORFOLK, to-wit:

We, E. Preston Grissom and Allan S. Reynolds, attorneys of record for Durell Products, Inc., petitioner herein, depose and say that on the day of March, 1973, we served a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on Ajax Products, Inc., respondent herein, by delivering the same to Maurice Steingold and J. Cameron Mann, counsel of record for the said respondent, at their offices located at 819 Citizens Bank Building, Norfolk, Virginia 23514.

E. Preston Grissom

Allan S. Reynolds

Subscribed and sworn to before me, at Norfolk, Virginia, this 9th day of March, 1973.

Notary Public

My Commission expires:

5-3-75